vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3969 OF 2007

Mrs.Sarita S. Melwani
Proprietress, carrying on business
in the firm and style of
M/s.Sarat India
through her C.A. Ms.Sonali S.
Melwani, having office situated
at 316B, Allied Industrial Estate
Off. MMC Road, Mahim
Mumbai- 400016 ... Petitioner

V/s.

1. Ms.Pallavi V. Talekar
59, Narayan Dolikar Wadi
Eknath Ghati Marg
Parel Village, Mumbai

2. Ms.Sheela P. Keer
Mahim Bhageshwar Bhavan
Room No.51, B.K. Marg No.2
Mahim, Mumbai

3. The Presiding Officer
6th Labour Court, Mumbai

4. The President
Industrial Court at Mumbai ... Respondents

Mr.J.P. Cama with Ms.Pallavi Dedhia for Petitioner
Mr.D.M. Mandavia for Respondent Nos.1 and 2
Respondent Nos.3 and 4 - formal parties
Mr.C.U. Singh, Amicus Curiae

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: **OCTOBER 16, 2007**
JUDGMENT DELIVERED ON: **NOVEMBER 30, 2007**

JUDGMENT:

. Rule. By consent of the parties, Rule made returnable forthwith and heard finally.

2. The petition challenges the order of the Labour Court in Complaint (ULP) No.838 of 2000 allowing the complaint filed by the respondent workmen. The order passed by the Industrial Court in revision application (ULP) No.267 of 2005 has also been challenged in this petition since it confirms the order of the Labour Court.

3. The facts giving rise to the present petition are as follows:

The petitioner is the Proprietress of an establishment known as M/s.Sarat Indian registered under the Bombay Shops and Establishments Act (for short, hereinafter referred to as 'management'). The management is engaged in the manufacturing and sale of melamine crockery. Undisputedly, Respondent No.1 has been working with the management from January 1984 whereas Respondent No.2 has worked since August 1986. The Respondent Nos.1 and 2 (hereinafter referred to as 'the workman) were issued notices on 16.8.2000 informing them that since the availability of work for the management was scarce, their services were being retrenched from 21.9.2000. Individual letters were issued to Respondent Nos.1 & 2. It appears that by letter dated 22.9.2000 both Respondent Nos.1 and 2 requested the management to permit them to continue in service for a further period

of one month from that date. Accordingly, the management continued them in service for one month i.e. upto 22.10.2000. Wages were paid to them during this period. Thereafter, on 1.11.2000, an amount of Rs.36331/- was paid to Respondent No.1 and Rs.28,241/- was paid to Respondent No.2 which according to the management was in full and final settlement of all their legal dues, including retrenchment compensation and gratuity. The workmen informed the management that they were accepting the amounts under protest.

4. On 11.12.2000, the workmen filed complaint (ULP) No.838 of 2000 under Items 1(b), (d) and (f) of Schedule IV of the MRTU & PULP Act. It was contended in the complaints that the management employed 20 persons but in order to deprive the employees of their legitimate dues in respect of the Provident Fund, ESI and Gratuity, etc. these 20 employees were shown working in different establishments run by the management. Registers were not maintained properly and were in breach of the labour laws. It was also pleaded that no appointment letters were issued to the workmen when they started work with the management. They were being paid wages @ Rs.89/-per day. The workmen also pleaded that there was sufficient work available with the management and that their juniors had been retained in service. Besides this, it was pleaded that the retrenchment compensation which was

paid to them was far less than the amounts to which they were actually entitled. It was also pleaded that wages in lieu of notice were not paid to the workmen. Thus, it was the grievance of the workmen that their services have been terminated in breach of the provisions of section 25F and 25G of the ID Act thereby committing unfair labour practices under Items 1(b), (d) and (f) of the Schedule IV.

5. An application for interim relief was also filed by the workmen. In reply to the application for interim relief, the management contended that the workman had been paid gratuity, retrenchment compensation and other legal dues for the years in which they had completed 240 days of work. In the case of Respondent No.1 although she was on the rolls for 17 years, she had completed 240 days only during 9 years and, therefore, was paid gratuity and retrenchment compensation for 9 years. Similarly, in the case of Respondent No.2 although she was on the rolls for 14 years, she had completed 240 days in 7 years of working and, therefore, her dues which included gratuity and retrenchment compensation calculated on the basis of her being in continuous service for 7 years.

6. The interim relief application was rejected. The management has filed its written statement

contesting the complaint on 18.5.2001. It was contended that the production of the management had reduced to 1/3rd. It was pleaded that the workmen were engaged in the production process of moulding, finishing and packing. They were not suitable for any other work, like handling of raw material, delivery and changing the moulds on machines, and they therefore could not be continued in service. It was pleaded that an employee junior to them had been retained since he was capable of doing the aforesaid work, besides the jobs performed by Respondent Nos.1 and 2. The management has then indicated in its written statement that from 1993 to 2000 the workmen had not completed 240 days of work. The management has specified the number of days worked and the number of paid holidays in each year. The management contended that the workmen having not completed "continuous service" as defined u/s 25B of the ID Act, they were not entitled to retrenchment compensation for the years in which they had completed less than 240 days during a period of 12 calendar months. The management then set out its sales figures for the years 1995-96 to 2000-01 in order to establish that there was a drop in sales during the years. The management has also stated in its written statement that the workmen were paid gratuity and retrenchment compensation in accordance with law. Besides these statutory dues, the workmen had been paid ex-gratia. It

was also contended that since the workmen were permitted to continue in service beyond 16.8.2000 and were paid wages during that time, the management was not liable to pay wages in lieu of notice since the notice had been issued to them on 16.2.2000 terminating their services with effect from 21.9.2000.

7. The workmen examined themselves before the Labour Court. Each workman filed her affidavit in lieu of examination in chief. Both the workmen have averred the management was still running its concern even after terminating their services. It is averred that their juniors had been retained in service without any reason. They have also deposed that retrenchment compensation paid to each of them was not correctly calculated and, therefore, not paid in accordance with law. Both the workmen have stated that they were unable to secure employment after being terminated from service. In their cross-examination, they have conceded that they were being paid wages at a daily rate. Respondent No.1 in her cross-examination stated that despite her attempts to secure another job, she was unable to do so since the salary offered was unsuitable. Respondent No.2 has also been cross-examined on the issue of her employment after being relieved from the management. She has admitted that she made no attempt to secure a job in companies manufacturing melamine products.

However, she had unsuccessfully attempted to secure a job in garment factories.

8. The management on the other hand, filed an affidavit of the constituted attorney of the proprietress. In her cross-examination, she has stated that six workers were working in the company when the retrenchment notice was issued to the workmen. The witness conceded that the management did not maintain a seniority list of the workers and, therefore, it was not displayed on the notice board 7 days prior to the issuance of the notice of termination. She has admitted that the establishment was working even after the workmen's services were terminated. This witness has also stated categorically that there was no question of showing her readiness to pay the remaining amount of retrenchment compensation as the amount paid to the workmen was correct and due to them in law. On the question of retention of juniors in service, the witness has deposed as follows:

> "4. ... Complainants doing the work of finishing, moulding occasionally packing, and if required cleaning. The male members were doing the said work. The male members who are senior to the complainants are doing the same work. Mr.Balkrishna Sawant, Mr.Sunil Barkar, Ms.Prabha Salaskar are doing the said work. Prabha Salaskar is senior than the male members and the complainants. ....."

9. The Labour Court has found that the workmen had been paid compensation which was far less than the retrenchment compensation payable to them in law. From the record it was apparent to the Labour Court that Respondent No.1 had completed 17 years of continuous service while Respondent No.2 was in continuous service for 14 years. Despite this, the management had paid them retrenchment compensation for 9 years and 7 years respectively. The Labour Court found that the management had not calculated national holidays and sanctioned leave while computing the continuous period. The evidence also indicated to the Labour Court that juniors had been retained in service while terminating the services of the respondent workmen. The findings of the Labour Court have been confirmed by the Industrial Court. The Industrial Court has observed that there was no evidence on record to indicate that the production of the management had fallen to 1/3rd of its normal production. It further observed that the management had not produced definite evidence on record before the Labour Court to support its contention that the workmen were unable to carry out the "heavy work" which their juniors would perform and for which they were retained in service.

10. An additional affidavit has been filed on behalf of the management in this Court. It is averred that

although the workmen have been paid gratuity and ex-gratia, "the Gratuity Act does not apply and, therefore, the amount under the nomenclature "gratuity" (paid ex-gratia) can be adjusted towards alleged claims of retrenchment compensation for the full 17 years and 14 years respectively". According to the affiant in that event the workmen have been paid more than what is due to them by the management.

BREACH OF THE PROVISIONS OF SECTION 25F OF THE INDUSTRIAL DISPUTES ACT -

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE MANAGEMENT:

The learned Counsel for the management submits that the impugned orders are erroneous for the following reasons:

(i) The workmen were not in continuous service as defined under section 25B of the Industrial Disputes Act entitling them to retrenchment compensation under section 25F of the ID Act.

(ii) Neither workmen had completed 240 days in the 12 months preceding the date on which they were retrenched. Reliance is placed on the judgment of the Apex Court in the case of *Mohan Lal v/s. Management of M/s.Bharat*

Electronics Ltd., **(1981) 3 SCC 225** in support of this proposition.

(iii) The workmen had completed 240 days in each year in only 9 years in the case of Respondent No.1 and in 7 years in case of Respondent No.2 and, therefore, they were not entitled to retrenchment compensation for the other years i.e., from 1993 to 2000 in case of Respondent No.1 and 1994 to 2000 in case of Respondent No.2. The workmen must satisfy the test of having completed 240 days of actual work in each year of service before it is held that they are entitled to retrenchment compensation for that year. Reliance is placed on the judgment in the case of *Karnataka State Road Transport Corporation & Anr. v/s. S.G. Kotturappa & Anr.*, **2005 II CLR 59**, *Bank of India & Anr. v/s. Tarun Kr.Biswas & ors.*, **2007 III CLR 230** and *Sriram Industrial Enterprises Ltd. v/s. Mahak Singh & Ors.,* **2007 II CLR 744.**

(iv) Weekly-offs, paid holidays and national holidays need not be considered while calculating whether the workman has completed 240 days in service in 12 months preceding the relevant date. This is because the workmen were engaged on a daily rated contractual basis, intermittently, as and when required. Reliance is placed on the judgment of this Court in Bajaj Auto Ltd.,

Pune v/s. Ashok Dnyanoba Dhumal & Anr., **2006 I CLR 441.**

(v) It is for the workmen to discharge the burden of proving that they were in service for 240 days in the preceding 12 months. Reliance is placed on the judgment of the apex Court in *Manager, R.B.I., Bangalore vs. S. Mani & Ors.*, **2005 II CLR 3.**

(vi) In the alternative it is submitted that the management has been generous in paying the workmen more than what was legally due to them. They have been paid gratuity although the Payment of Gratuity Act is not applicable to the establishment. The amount paid as gratuity therefore can be adjusted towards the retrenchment compensation.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE RESPONDENTS:

The learned advocate representing the workmen supported the impugned judgment on the following grounds:

(i) Non-payment of retrenchment compensation as stipulated under section 25F of the Industrial Disputes Act renders the action of the management bad in law and void ab initio.

(ii) The scope of the definition of continuous service has been considered in the judgment of a learned Single Judge of this Court in *Ramasamuz Narsing Updhyaya v. Vinubhai M.Mitra,* **1982 II LLJ HC BOM 186** where it has been held that the provisions of clauses 1 and 2 of section 25B apply to two different contingencies. It is not necessary for the workmen to prove that in each year they had completed 240 days of service since they were covered by clause 1 of section 25B. The provisions of clause 2 of Section 25B need not be considered once the workmen are governed by clause 1 of of section 25B.

(iii) The retrenchment is also invalid because neither was the notice as required under section 25F given to the workmen nor were they paid wages in lieu of notice. The notice must be specifically for one month only and if the services of the workmen do not cease after expiry of one month then fresh notice would have to be issued or wages in lieu of notice would have to be paid when the workmen are terminated from the service. In the present case, the notice is dated 16.8.2002 which was to take effect form 21.9.2002, beyond the period one month and therefore it was necessary to either give a fresh notice or to pay wages in lieu of the notice.

(iv) The amount which has been paid to the workmen under different heads cannot be adjusted towards the shortfall

in retrenchment compensation. The Payment of Gratuity Act is applicable to the management and the workmen employed therein have been paid gratuity as seen from exhibits ‘W’ and ‘X’ of the petition.

SUBMISSIONS OF MR.C.U. SINGH, APPOINTED AMICUS CURIAE:

(i) "Continuous Service" as defined u/s 25B(1) of the Industrial Disputes Act must be interpreted to mean that the workman is continuously employed and on the rolls to of the company. The relationship of master and servant is intact. The absence from work could be for the reasons contained in section 25B(1). Any workman fulfilling these criteria would be in continuous service. Clause 2 of section 25B contemplates a break in the master and servant relationship and therefore the service is intermittent. It is only when there is a break in the master and servant relationship that the fiction under clause 2 of section 25B would come into play. The judgment in the case of Mohan Lal (supra) is based on a workman "rendering service". If the workmen is on the rolls of a company, the question of him having to satisfy the test of continuous service contained in section 25B(2) does not arise.

(ii) In the case of *Ramakrishna Ramnath v. The Presiding Officer & Anr.*, **1970 (3) SCC 67**, the Supreme Court has considered the terms "completed years of service" and "continuous service". Once the workman qualifies either under clause (1) of section 25B or clause 2, the entire service is to be taken into consideration for computing the retrenchment compensation which is to be paid to the workmen. The payment of retrenchment compensation cannot be confined to only those years in which the workman works for 240 days.

(iii) When a workman is continuously on the muster roll of a company and therefore in continuous service the weekly offs and paid holidays must be taken into consideration while computing the retrenchment compensation.

(iv) Rule 23(4), (5) and (6) of the Minimum wages rules framed under the Minimum Wages Act contemplates payment for weekly offs while fixing the minimum wages. Therefore, the judgment in the Bajaj Auto Ltd. (supra) will not be applicable as that was a case of factory workers.

CONSIDERATION -

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11. The submissions of the learned Counsel for the Petitioner are based on certain inaccurate factual assumptions. The learned Counsel assumes that because the workmen have been paid wages at a daily rate, the workmen automatically become contractual workmen. He assumes incorrectly again that the workmen worked intermittently, and therefore, such workmen are not entitled to the reliefs sought in the complaint. There is not a single averment in the written statement to the effect that the workmen were employed intermittently or that they were employed as and when work was available with the management. Nor is there a whisper about the workmen being contractual workmen as understood in industrial jurisprudence. How the learned Counsel assumes that a person who earns wages at a daily rate automatically becomes a person who is a contractual workman and a workman who is employed intermittently, is difficult to fathom. Such surmises are not even remotely alluded to either in the pleadings of the management or in the evidence led by the management. Therefore, the entire argument based on these fundamental factual inaccuracies has no relevance at all to the present case.

12. The submission of the learned counsel that it is necessary for a workman to prove that he has worked for

240 days in the preceding 12 months prior to the date of retrenchment is not justified in the facts and circumstances of the present case. There is no dispute that Respondent No.1 was employed from 1984 and Respondent No.2 was employed since 1986 by the management. The learned Counsel's contention, that it was necessary to ascertain whether in each period of 12 months a workman has completed 240 days, is unacceptable. What is to be considered is whether the workman was continuously employed and on the rolls of the management. Retrenchment compensation u/s 25F is payable to every workman who is in continuous service for not less than one year. Continuous service has been defined in section 25B as follows:

> 25B. Definition of continuous service. - For the purposes of this Chapter, -
>
> (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
>
> (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer -
>
> (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than -

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than -

(i) ninety-five days, in the case of a workman employed below ground in mine; and

(ii) one hundred and twenty days, in any other case.

Explanation. - For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which -

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946(20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.

Thus, a workman must qualify for being entitled to retrenchment compensation in either of two ways. Under 25B(1), a workman is said to be in continuous service if

the period of service is uninterrupted and includes service which is interrupted on account of sickness, authorised leave, accident, strike, a strike which is not illegal, a lockout, cessation of work which is not due to the fault of the workman. The name of such a workman would be continuously on the rolls of the establishment. The master and servant relationship is kept intact. There are no breaks in his service during which period of time he is not on the rolls of the establishment. Subsection (2) of section 25 B is applicable to those workmen who are not in continuous service within the meaning of clause (1) but by a deeming fiction the service of such workmen is said to be continuous if during a period of 12 calendar months, preceding the date with reference to which the calculation is to be made, he has actually worked under

the employer for not less than 240 days or 190 days in case of a workman employed in a mine. A workman who is not covered by clause (1) of section 25B is deemed to be in continuous service of the employer if he fulfils the criteria laid down in clause 2 i.e. he works for 240 days in 12 preceding calendar months. The number of days actually worked by a workman include the number of days when he is laid off, he has been on leave with full wages, he has been absent due to an accident arising out

of and in the course of employment or in case of a female she was on maternity leave for a period of 12 weeks. Thus, the number of days which are to be taken into account for the purposes of computing 240 days in clause 2 are similar to those days which are mentioned in clause 1. The explanation to clause 2 clarifies this position.

13. Great emphasis was laid by the learned Counsel for the management on the judgment in the case of *Mohan Lal (supra)* to submit that to qualify for receiving retrenchment compensation the workman must complete 240 days of uninterrupted service within 12 months preceding the date on which the retrenchment is to be effected. According to the learned Counsel, since the retrenchment was effected pursuant to the notice of 16.8.2000 and was to take effect on 21.9.2000, it was necessary to work backwards and consider whether in the 12 preceding calendar months, the workman had completed 240 days. Para 12 of the judgment in this case reads as follows:

> 12. Sub-section (2) incorporates another deeming fiction for an entirely different situation. it comprehends a situation where a workman is not in continuous service within the meaning of sub-section 91) for a period of one year or six months, he shall be deemed to be in continuous service under an employer for a period of one year or six months, as the case may be, if the workman during the period of 12 calendar months just preceding the date with

reference to which calculation is to be made, has actually worked under that employer for not less than 240 days. Sub-section (2) specifically comprehends a situation where a workman is not in continuous service as per the deeming fiction indicated in sub-section (1) for a period of one year or six months. In sucha case he is deemed to be in continuous service for a period of one year if he satisfies the conditions in sub-clause (a) of clause (2). The conditions are that commencing (sic) the date with refernece to which calculation is to be made, in case of retrenchment the date of retrenchment, if in a period of 12 calendar months just preceding such date the workman has rendred service for a period of 240 days, he shall be deemed to be in continuous service for a period of one year for the purposes of Chapter V-A. It is not necessary for the purposes of clause (2)(a) that the workman should be in service for a period of one year. If he is in service for a period of one year and that if that service is continuous service within the meaning of claue (1) his case would be governed by clause (1) and his case ned not be covered by clause (2). Clause (2) envisages a situation not governed by clause (1). And clause (2)(a) provides for a fiction to treat a workman in continuous uninterrupted service for a period of one year but he has rendered service for a period of 240 days during the period of 12 calendar months counting backwards and just preceding the relevant date being the date of retrenchment. In other words, in order to invoke the fiction enacted in clause (2)(a) it is necessary to determine first the relevant date, i.e. the date of termination of service which is complained of a retrenchment. After that date is ascertained, move backward to a period of 12 months just preceding the date of retrenchment and then ascertain whether within the period of 12 months, the workman has rendered service for a period of 240 days. If these three facts are affirmatively answered in favour of the workman pursuant to the deeming fiction enacted in clause (2)(a) it will have to be assumed that the workman is in continuous service for a period of one year and he will satisfy the eligibility qualification enacted in Section 25-F. On a pure grammatical construction the contention that even for invoking clause (2) of Section 25-B the workman must be shown to be in continuous service for a

> period of one year would render clause (2) otiose and socially beneficial legislation would receive a set back by this impermissible assumptions. The contention must first be negatived on a pure grammatical construction of clause (2). And in any evnet, even if there be any such thing in favour of the construction, it must be negatived on the ground that it would render clause (2) otiose. The language of clause (2) is so clear and unambiguous that no precedent is necessary to justify the interpretation we have placed on it. But as Mr.Markandeya referred to some authorities. ..."

14. However, the Supreme Court does not say in *Mohan Lal's case (supra)* that when a workman qualifies for payment of retrenchment compensation under clause 1 of section 25B, it was still necessary for him to prove that in each of the years he was in service, he has completed 240 days. Once a workman is in uninterrupted service and, therefore in continuous service under section 25B(1), there is no need to consider the provisions of section 25B(2). Section 25B(2) would apply where although a person renders service for a period of 12 months, he does not complete the entire 365 days but works only for 240 days. However, in the present case, section 25B(2) is not applicable at all. The provisions of section 25B(1) are relevant. In the case of *Ramakrishna Ramnath v. The presiding Officer & Anr.*, **1970 (3) SCC 67**, the Supreme Court was considering a claim made for closure compensation under section 25FFF. Closure compensation is to be paid under this

section as if the workman is retrenched and the compensation is to be calculated in accordance with section 25F. The Supreme Court has negatived the contention raised by the employer that a workman has to establish that he had worked 240 days in each year for which the compensation was claimed. The Supreme Court has held that it was not necessary for a workman who has satisfied the tests u/s 25B to prove that he has worked for all the period he has been in service of the employer for 240 days in a year.

15. In the case of *Ramasamuz Narsing Updhyaya v. Vinubhai M.Mitra,* **1982 II LLJ HC BOM 186** relied on by Mr.Mandevia, appearing for the workmen, a learned Single Judge of this court considered the scope of the definition of 'continuous service' contained in section 25B. In this case, the employer contended that the workmen had joined service in January 1955 but that he was not in continuous service till April 1975 when his services came to an end. The company also claimed that the workmen had not worked for 240 days in each year i.e. in the years 1948 - 1958, 1965, 1967 and 1971 to 1974 and therefore the workmen could not be deemed to be in continuous service as contemplated under section 25B. The learned Single Judge has held that the provisions of clauses 1 and 2 of section 25B apply to two different contingencies. The learned Judge held that clause 2 is

applicable only when the workman is not in continuous service within the meaning of clause 1. The learned Judge held thus in para 9:

> "... The mere fact that the workman had not worked for 240 days in some years during his long employment would not debar him from claiming the entire amount or retrenchment as provided by S.25-F of the Act and the labour Court was clearly in error in not awarding the retrenchment compensation by taking into consideration the entire period of service from January, 1945 to April, 1975. The mere fact that during some years in this long period, the workman had not worked for 240 days is not a sufficient answer to deprive him of the retrenchment compensation by ignoring the entire perod. Once, it is found that the workman is in continuous services, then it is wholly immaterial whether he has worked for a particular number of days in a particular year. The contingency with demands the worker to work for a period of 240 days as provided by sub-s.(2) of S.25-B would come into play provided the workman is not in continuous service, as required under S.25-B(1) of the Act. In the present case it is clear that the workman was in continuous service all along and his claim for retrenchment compensation as made in the application ought to have been granted. There could not be any interruption in the service of the workman because neither he has left the service, nor he has been dismised for not being on leave which was not authorised and, therefore, the Labour Court was clearly in error in holding that the service of the petitioner was interrupted."

While delivering this judgment, the learned Judge has considered the decision in *Mohan Lal'* case.

16. This controversy as to whether a workman needs to prove that he has completed 240 days in each of the

preceding years in which he works with an employer is in my opinion, now well settled. In the case of *M/s.U.P. Drugs and Pharmaceuticals Ltd. v/s. Ramanuj yadav & Ors.,* **AIR 2003 SC 3337**, the Supreme Court was dealing with a matter which arose under the U.P. Industrial Disputes Act. The Supreme Court considered the expression "continuous service" as defined u/s 2(g) of the U.P. Act in juxtaposition with the definition of continuous service contained in section 25B of the I.D. Act. The Supreme Court considered the evaluation of the concept of continuous service which was contained in 2(eee) of the ID Act. This provision was later deleted and section 25B was amended to read as aforesaid. The Supreme Court considered the same argument as advanced by Mr.Cama for the management that *Mohan Lal's case* (supra) requires one to retrace the preceding 12 months and to consider whether the workman has completed 240 days. The Supreme Court has observed that the decision in the case of *Mohan Lal (supra)* does not lay down that if a workman had worked for more than 240 days in any number of years and if during the year of his termination he had not worked for that number of days he would not be entitled to the benefit of section 25B. Referring to *Ramakrishna Ramnath's case (supra*) the Supreme Court observed held that it was not necessary for a workman to establish that he had worked for 240 days in each 12 month period prior to his termination

from service. This judgement was later considered by the Division Bench of this court in the case *Jairaj N.Shetty v/s. Union of India,* **2005 III CLR 106**. The Division Bench set aside the decision of the learned Single Judge of this Court which held that a workman must complete 240 days in the year preceding the termination of his service and not in the earlier years to avail of the benefits under section 25F r/w 25B of the ID Act. The division bench has held that the legal position is crystallised in view of the judgment in *U.P. Drugs and Pharmaceuticals Ltd*. (supra) that u/s 25B of the ID Act if a workman has worked for more than 240 days in any one of the earlier years, he would be deemed to in continuous service.

17. Mr.Cama tried to contend that the Division Bench had not correctly interpreted the law as laid down in *U.P. Drugs & Pharmaceuticals Ltd.* (supra). He submits that the U.P. Industrial Disputes Act does not have the word "preceding" in section 2(g) whereas in the Central Act, the workman is deemed to be in continuous service if he has worked for a period of 240 days preceding the date to which calculation is to be made. He submits that in *Sriram Industrial Enterprises (supra),* the Supreme Court again dealt with a case falling under the U.P. Industrial Disputes Act. It referred to its earlier decisions in *U.P. Drugs & Pharmaceuticals Ltd.*

(supra) and *Manager, R.B.I., Bangalore (supra).* The learned Counsel for the management was at pains to point out that both the judgments in *U.P. Drugs & Pharmaceuticals Ltd.* and *Sriram Industrial Enterprises* are based on the provisions of U.P. Industrial Disputes Act which do not contain the word "preceding". He has attempted to distinguish these cases from the present case. In my opinion, both the judgments do not in any manner lay down the law as submitted by the learned Counsel for the management, that it was necessary for the workman to establish that in the preceding 12 months, he has worked for 240 days when he qualifies for receiving compensation under clause 1 of section 25B.

18. I need not consider the controversy as to whether weekly offs should be included while computing whether a workman has completed 240 days. Admittedly, the workmen have qualified to received compensation under section 25B(1). Therefore, it is not necessary to consider whether weekly offs should be included for computing 240 days as the provisions of 25B(2) would be applicable only if the provisions of 25B(1) are not applicable. I have already held that the provisions of section 25B(1) are applicable and, therefore, I need not consider this issue at all in n the present case. Hence, the compensation which has been paid to the workman has wrongly been calculated and therefore there

is no termination in the eyes of law as held in the case of *Mohan Lal v/s. Bharat Electronics (supra).*

19. The alternative submission of Mr.Cama that the amount which was paid as gratuity should be considered as retrenchment compensation cannot be accepted. Firstly it was never the case of the management before the Labour Court or the Industrial Court that gratuity was not payable. It is for the first time in the additional affidavit filed subsequent to the filing of the petition that the management has stated that the provisions of Payment of Gratuity Act are not applicable and that therefore, the amount paid under the head "gratuity" should be treated as retrenchment compensation. There is nothing on record to indicate that the Payment of Gratuity Act is not applicable. In fact, the management has annexed at Exhibit W and Exhibit X to the petition two receipts indicating the amounts paid two of its employees. These receipts establish that gratuity has been paid to both the employees. Mr.Cama has attempted to submit that the management through the "goodness of its heart" paid gratuity to the workman although they were not entitled to it. The management should not be bound by its conduct in paying the gratuity and must be permitted to contend that the Payment of Gratuity Act does not apply, adds Mr.Cama. This submission must be rejected. It is

surprising that when the written statement was drafted, the management did not feel it necessary to convey that the Payment of Gratuity Act was not applicable. This is a question of fact which the management ought to have pleaded in the first instance. The workman had pleaded that in fact there were 20 employees whose names are shown on different registers for the purposes of evading labour legislations. This pleading has not been denied by the respondents in the written statement. The denial is to the effect that the management does not employ more than 20 employees. The provisions of Payment of Gratuity Act apply to every shop or establishment in which 10 or more persons are employed. Thus, there is no pleading at all in the written statement to indicate that 10 or more persons were not employed with them. The only denial is that no more than 20 people were employed but there is no positive assertion that less than 10 persons were employed on any date in the preceding 12 months. Thus this submission of the learned counsel that the amount which was paid under the head of gratuity should be treated as retrenchment compensation cannot be countenanced.

BREACH OF SECTION 25G OF THE INDUSTRIAL DISPUTES ACT -

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20. The Labour Court has also held that the

management had violated the provisions of section 25G of the Act. The provisions of section 25G require an employer to maintain the principle of "last come first go" when retrenching a person. This rule can be departed from only when reasons are recorded by the employer. Mr.Mandevia for the workmen drew my attention to the admission contained in the depositions of the witness examined on behalf of the management to the effect that juniors had been retained in service. The Labour Court and the Industrial Court have rightly held that reasons were not recorded by the employer for departing from the principle contained in section 25G and, therefore, the termination of the service of the workman was illegal. Mr.Mandevia contends that the very fact that the section provides that reasons must be recorded presupposes that those reasons must be recorded in writing.

21. Mr.Cama submits that there was only one individual in each category and therefore the question of recording reasons for departing from the normal rule did not arise. He submits that those who were retained in service were doing their normal work and were also able to carry out the jobs done by the respondent workmen and therefore, their services were retained. It is trite law as held in *Bhogpur Co-operative Sugar Mills Ltd. v. Harmesh Kumar,* **2007 I CLR 227**, *State of*

Haryana v/s. Dilbagh Singh, **2007 I CLR 550** and *Municipal Corporation of Delhi v/s. Shri Khacheru, Through Municipal employees Union & Ors.*, **1993 I CLR 357** that any departure from the provisions of section 25G requires reasons to be recorded in writing by the management. There must be some record to indicate why the employer is departing from the rule of last come first go. Obviously the reasons must be intimated to the workman who is affected, either prior to effecting the retrenchment or when the notice of retrenchment is tendered to him. This would enable the workman to challenge his termination from service more effectively. No document was produced on record by the management to indicate its reasons for departing from the normal rule. There are no reasons recorded nor is there any evidence to suggest that there was only one individual in each category, which fact ought to have been established by the management. In these circumstances, it is difficult to find fault with the reasoning of the Labour court that there is a violation of section 25G.

22. Thus, the management has committed an unfair labour practice by terminating the services of the workmen in breach of section 25F and section 25G as rightly held by the Labour Court and the Industrial Court.

23. Mr.Mandevia had also submitted that the workmen were not paid wages in lieu of notice prior to terminating their services. He submits that the notice was issued to the workmen on 16.8.2000 terminating their services on account of retrenchment with effect from 21.9.2000. According to the learned Advocate, that notice was not valid as under section 25F, a notice of one month is what is required to be given to the workmen. He submits that if the workmen are permitted to work beyond the notice period of one month then the employer must either issue a fresh notice of exactly one month or wages in lieu thereof. He submits that not only were the workmen continued in service beyond one month of the date of the notice, they were also permitted to continue in service even beyond 21.9.2000.

24. This submission of the learned Counsel cannot be accepted. The provisions of the law stipulate that one month’s notice must be given to the workman before his services are terminated on account of retrenchment. The legislative intent for giving the workman such notice is to soften the rigour of unemployment which would take effect one month from the date of the notice. It, therefore, presupposes that at least one month’s notice must be given. The section does not prevent an employer from giving a notice in excess of a month. Admittedly, in the present case, the workmen have been paid wages

upto the date they continued in service. Thus, they have been given notice of more than a month prior to terminating their services. Section 25F cannot be read to mean that the notice must be only of a month and not more. The rigour of the section is that the notice period cannot be less than one month. Therefore, this submission of the learned advocate is without merit.

25. In the circumstances, the petition is dismissed. Rule discharged with costs to Respondent No.1 and Respondent No.2.

26. Before I part with the judgment, I must express my gratitude to Mr.C.U. Singh, who I had appointed amicus curiae in the matter. He has assisted the Court with his usual fairness and adroitness.